Filed 1/8/19 In re M.B. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re M.B. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. K.M., Defendant and Appellant.	E071200 (Super.Ct.Nos. J257742, J257743, J257744, J257745 & J257746) OPINION

APPEAL from the Superior Court of San Bernardino County. Christopher B. Marshall, Judge. Reversed with directions.

Elizabeth Klippi, under appointment by the Court of Appeal, for Defendant and Appellant.

Michelle D. Blakemore, County Counsel, and Jamila Bayati, Deputy County Counsel, for Plaintiff and Respondent.

K.M. (mother) appeals from juvenile court orders terminating parental rights to her five children, R.B., K.B., S.B., B.B., and M.B., pursuant to Welfare and Institutions Code section 366.26. (All additional undesignated statutory references are to the Welfare and Institutions Code.) Mother's only argument for reversal is that the San Bernardino County Department of Children and Family Services (CFS) did not comply with its duty to adequately investigate the children's possible American Indian heritage and to provide adequate notice of the juvenile court proceedings to the relevant Indian tribes, as mandated by the Indian Child Welfare Act. (25 U.S.C. § 1901 et seq.; ICWA.) In particular, mother argues (1) CFS did not interview family members to obtain information about the children's maternal grandfather (A.M.) and maternal great-grandmother (B.M.), who was supposedly "full Cherokee," and (2) the information about A.M. and B.M. provided to Indian tribes was incomplete.

We agree with mother and conditionally reverse and remand. The relevant reports and declarations of due diligence filed with the juvenile court provide absolutely no information whatsoever about the efforts CFS took to obtain information about the children's possible Indian heritage, so we must conclude the juvenile court erred by finding the ICWA inquiry and notice were sufficient. On remand, CFS shall file with the juvenile court a supplemental report documenting the steps it has already taken to obtain information about the children's Indian ancestry, and the juvenile court shall determine anew whether the inquiry and notice were adequate and whether additional inquiry and notice is necessary.

I.

FACTS AND PROCEDURAL BACKGROUND[1]

On October 4, 2014, CFS responded to a referral of possible abuse and severe neglect. Mother had given birth to M.B. the day before, and both mother and child tested positive for marijuana and methamphetamine. During the initial investigation, mother told the social worker "she may have Cherokee Ancestry," and the alleged father said, "he has no known American Indian heritage."

CFS filed petitions in the juvenile court alleging the children were dependents of the court pursuant to section 300, subdivision (b), and alleged that mother and the alleged father[2] willfully or negligently failed to supervise or protect the children and/or were unable to provide the children with regular care because of their use of methamphetamine and marijuana and because of domestic violence in the home. The petitions and detention reports filed for each child indicated the children may have Cherokee ancestry and, therefore, that ICWA "does or may apply." CFS recommended that the juvenile court direct mother and the alleged father to complete parental notification of Indian status (ICWA-020) forms.

[1] Because mother's sole argument on appeal relates to the ICWA inquiry and notice, we need not provide a detailed recitation of the facts.

[2] Father is not a party to this appeal.

Before their initial appearance, mother and the alleged father completed ICWA-020 forms. The alleged father checked the box for "I have no Indian ancestry as far as I know." Mother checked the box for "I may have Indian ancestry" and, in the space provided for "Name of tribe(s)," she wrote, "Cherokee." When asked by the juvenile court if the information on his form was correct, the alleged father answered, "Yes." The court then addressed mother:

"THE COURT: . . . [¶] . . . [O]n your [form] you indicated that you may have Indian ancestry and that would be Cherokee. Is that correct?

"THE MOTHER: Yeah. That's according to --

"THE COURT: According to --

"THE MOTHER: My mom. I guess she said I have Indian blood."

At the end of a contested detention hearing, the juvenile court found that a prima facie case had been made that the children were dependents within the meaning of section 300, subdivision (b), but ordered that the children remain in the custody of mother and the alleged father under the supervision of the court and CFS. The court found that mother and the alleged father had completed and filed form ICWA-020.

On December 16, 2014, CFS filed amended petitions in the juvenile court. The children had been detained and removed from their parents' care four days earlier when it was determined that mother was still using methamphetamine, and that the children were at risk of abuse or neglect. The amended petitions and amended detention reports continued to state the children's possible Cherokee ancestry. The juvenile court made a

prima facie finding that detention out of the home was necessary, and ordered that the parents receive visitation and reunification services.

In a report filed for the jurisdiction and disposition hearing, CFS again reported the children possibly had Cherokee ancestry and recommended the juvenile court find that ICWA may apply. In a declaration of due diligence filed the same day, CFS informed the juvenile court that it had sent notice of the proceedings to Cherokee tribes in Oklahoma and North Carolina, as well as to the U.S. Bureau of Indian Affairs (BIA) in Washington, D.C., and Sacramento, California. The report and declaration provided no information whatsoever about the extent of CFS's investigation into the children's possible Indian ancestry.

The notices sent to the Cherokee tribes and the BIA included information about mother and the alleged father, including his current and former addresses (mother's addresses were omitted as confidential) and the parents' dates and places of birth. In the spaces provided for the names of any tribes or bands of Indians whose members might be the parents' ancestors, the social worker listed the federally recognized Cherokee Indian tribes for mother and the BIA for the alleged father. The notices also included the names, current (but not former) addresses, and dates and places of birth for the children's grandparents. For both grandmothers and the paternal grandfather, the form showed "No information available" regarding possible Indian tribal membership or enrollment. With respect to A.M., the children's maternal grandfather, the notices provided no current *or* former address, included only the place of birth (Milwaukee, Wis.) but no date, listed the various Cherokee tribes in the space for possible tribal membership or enrollment, and

stated CFS had no information whether he was deceased and, if so, where and when he had died. The notices provided even less information about the children's great-grandparents. For B.M., the children's maternal great-grandmother (mother to A.M.), the notices indicated she was deceased but not where and when she had died, indicated she was born in Milwaukee but provided no date of birth, and listed possible Cherokee membership or enrollment.

The United Keetoowah Band of Cherokee Indians in Oklahoma responded that it had conducted a search of its enrollment records, and "[t]here is no evidence that supports the above referenced child(ren) is/are descendents from anyone on the Keetoowah Roll, therefore; I.C.W. of the United Keetoowah Band of Cherokee Indians in Oklahoma will not intervene in this case."

Mother and the alleged father submitted on the recommendations in the jurisdiction and disposition report. The juvenile court found true the allegations in the amended petitions that the children were dependents within the meaning of section 300, subdivision (b); made a finding that the alleged father was the children's presumed father; and ordered that the parents receive visitation and reunification services The court also found that CFS had initiated noticing under ICWA, and that ICWA may apply.

In a final declaration of due diligence filed on March 4, 2015, CFS informed the juvenile court that the Eastern Band of Cherokee Indians in North Carolina, and the Cherokee Nation of Talequa, Oklahoma, had responded to the ICWA notices. As with the earlier declaration of due diligence, this one provided no information about the steps CFS had taken to investigate the children's possible Indian ancestry. The Eastern Band of

Cherokee Indians stated it had reviewed its tribal registry and concluded the children were not registered nor eligible to register as members of the tribe and, therefore, that the tribe was "not empowered to intervene in this matter." The Cherokee Nation similarly responded that it had searched its tribal records for the names of the children and their biological relatives and found that "none of the names provided can be found as current enrolled members." Therefore, the tribe concluded the children were not Indian children for purposes of ICWA, and that it lacked legal standing to intervene. Based on that information, the juvenile court signed an order finding that ICWA did not apply, and that no further notice was required.

Despite the court's earlier order that ICWA did not apply, status reports filed for the six-month and 12-month review hearings continued to report that the children possibly had Cherokee ancestry, and that ICWA "does or may apply."[3] Because the parents failed to follow through on their case plans, CFS recommended the juvenile court terminate reunification services at the 12-month status review hearing and set a hearing under section 366.26 for selection of permanent plans for the children. The juvenile court followed the recommendation, terminated reunification services, and set a hearing under section 366.26.

[3] In its brief, counsel for CFS hypothesizes that "the social worker was evidently unaware the court [had already] found ICWA did not apply."

Unlike the previous two reports, the report CFS prepared for the section 366.26 hearing stated ICWA "does not apply."[4] The juvenile court selected legal guardianship as the permanent plan for the children and subsequently dismissed the dependency. Although the prior report stated ICWA did not apply, in a status review report filed for a six-month postpermanency hearing, CFS stated ICWA "does or may apply." (See, *ante*, fn. 3.)

On January 20, 2018, the children's legal guardians filed a modification petition pursuant to section 388. The guardians informed the juvenile court that they wished to adopt all five children, and they requested that the court set a hearing under section 366.26 to terminate parental rights and free the children for adoption. In a written response, the social worker recommended the court grant the request. The social worker accurately stated that three years earlier, the court had found that ICWA does not apply. The juvenile court granted the request, reinstated the dependencies, and set a hearing under section 366.26 for selection of adoption as the permanent plan for the children.

In a report prepared for the section 366.26 hearing, the social worker recommended that the juvenile court terminate parental rights to free the children for adoption. The social worker again stated that ICWA "does not apply."

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[4] The report also indicated that a due diligence declaration was attached, but it was not included with the copy of the hearing report contained in the record on appeal. We presume the due diligence declaration referred to in the report is the same as the final due diligence declaration filed on March 4, 2015.

On July 11, 2018, the children's maternal grandmother completed a form created by CFS, entitled "RELATIVE: Family Find and ICWA Inquiry." She indicated she wished to be considered to have the children placed in her home. Under the heading, "Native American Ancestry Information," she checked the "No" box to indicate she herself had no Indian ancestry. She also checked the "Yes" box to indicate that "other relatives" have Indian ancestry and, in spaces provided, she entered mother's and the presumed father's names, mailing address, phone numbers where they could receive messages, and dates of birth. In the space for "Tribe of Band Name, Location and Enrollment #," she wrote, "Cherokee" and "Wisc." followed by a question mark for mother. Notwithstanding the presumed father's repeated denial that he had any knowledge of Indian ancestry, the maternal grandmother wrote, "Cherokee," followed by a question mark for the presumed father. She then checked the "No" box to indicate that none of the children's family members had ever lived on federal trust or reservation land, and she checked the "No" box to indicate that neither the children nor any family members had ever attended a Native American school. Finally, she checked the "Yes" box to indicate that one or more of the children's family members had received medical treatment at an Indian health clinic or a United States public health hospital.

The maternal grandmother appeared at a hearing conducted on July 11, 2018, and the juvenile court indicated it had received her completed form. The court then addressed the parents: "I believe the parents have both told us in the past that they have no Native American or American Indian ancestry. [¶] Is that a correct statement still?" Mother

responded, "No. I was told that my grandmother [B.M.] was Cherokee Indian. I'm not—as far as tribes, she had claimed she was part of the tribe. But on my behalf, I have never claimed the tribe or contacted the tribe to go further with that." The court then asked the maternal grandmother, "[Is] there any Native American or American Indian ancestry in the family?" She answered, "Not on my side, just on the children's. Their great grandmother was full Cherokee." After some discussion regarding the ICWA documents in the case file, the juvenile court ordered mother to keep the social worker informed of any information she might obtain regarding Indian ancestry and asked the social worker "to follow up with respect to the Cherokee tribe to be sure they have been noticed."

At the section 366.26 hearing, counsel for CFS asked that the juvenile court admit into evidence an ICWA declaration of due diligence dated August 17, 2017, and ICWA findings and order dated October 10, 2017. The court admitted those documents with no objection, but they were not included in the record on appeal.[5] Counsel for the parents requested that the hearing be continued so maternal grandmother could be assessed as a prospective adoptive parent or, in the alternative, that the juvenile court maintain the current legal guardianship of the children and not terminate parental rights. Counsel for the children submitted on the social worker's recommendation that the court terminate parental rights, and argued the children were generally and specifically adoptable and that no exceptions to termination of parental rights existed. In addition, counsel for the

[5] In her opening brief, mother assumes that counsel for CFS was mistaken when he referred to ICWA findings made in October 2017, and that he likely meant to refer to the court's ICWA findings made in March 2015.

children informed the court that "[t]he children all emphatically want to be adopted." The court adopted the social worker's recommendations and terminated mother's and the presumed father's parental rights.

Mother timely appealed.

II.

DISCUSSION

To comply with ICWA, the juvenile court and CFS "have an affirmative and continuing duty to inquire whether" a child who is the subject of a section 300 dependency petition "is or may be an Indian child . . . ." (§ 224.3, subd. (a); see also Cal. Rules of Court, rule 5.481(a).) If CFS "knows or has reason to know that an Indian child is involved" in a section 300 proceeding, it must "make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable, by interviewing the parents, Indian custodian, and extended family members to gather . . . information" including the identities of tribes in which the child could be a member or eligible for membership, as well as biographical and contact information for the child and his or her biological parents, grandparents, and great-grandparents. (§ 224.3, subd. (c); see § 224.2, subd. (a)(5); Cal. Rules of Court, rule 5.481(a)(4)(A).)

CFS must also seek information from "any other person that reasonably can be expected to have information regarding the child's membership status or eligibility." (Cal. Rules of Court, rule 5.481(a)(4)(C).) Once an appropriate inquiry is made, CFS is required to contact the BIA and all tribes in which the child may be a member or eligible for membership, and it must provide those entities with various information, notices, and

documents as set forth by statute, including the identifying information CFS has obtained about the child and his or her biological relatives. (§ 224.2, subds. (a) & (b).)

"ICWA notice requirements are strictly construed" and "must contain enough information to be meaningful," including, if known, identifying information for the child's grandparents and great-grandparents. (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703.) "Just as notice to Indian tribes is central to effectuating ICWA's purpose, an adequate investigation of a family member's belief a child may have Indian ancestry is essential to ensuring a tribe entitled to ICWA notice will receive it." (*In re Elizabeth M.* (2018) 19 Cal.App.5th 768, 787.) If CFS receives additional information about the child's biological relatives after ICWA notices have been sent out, it must send updated notices, even if the juvenile court has already found ICWA does not apply. (§ 224.3, subd. (f); *In re I.B.* (2015) 239 Cal.App.4th 367, 377; see *In re Isaiah W.* (2016) 1 Cal.5th 1, 11 [court's continuing obligation to inquire whether minor is an Indian child "applies to 'all dependency proceedings,'" including a proceeding to terminate parental rights, even if the court previously determined ICWA was inapplicable].)

As mother contends, the reports and declarations of due diligence filed in the juvenile court contain no information about what, if any, efforts CFS made to determine whether the children had Indian ancestry for purposes of ICWA. Mother stated she had possible Cherokee ancestry, and both mother and the children's maternal grandmother informed the juvenile court that the children's maternal great-grandmother was "full Cherokee." Although the notices provided to the Cherokee tribes and the BIA include

some information about A.M. and B.M., the information is incomplete. For instance, the notices state that both A.M. and B.M. were born in Milwaukee, Wisconsin, but not when they were born, and state that B.M. is deceased, but not where and when she died. CFS did not inform the juvenile court whether it had interviewed or attempted to interview A.M. and B.M.'s living relatives, and did not state that, despite its best efforts, the information provided in the notices was all it was able to obtain.

CFS contends mother forfeited her challenge to the adequacy of the ICWA inquiry and notice in this case by not objecting in the juvenile court. We recently rejected that same argument. "[B]ecause the juvenile court's duty to comply with ICWA's notice requirements is ongoing until it is determined by the relevant tribe, *following adequate notice*, that the child is not a Indian child [citation], the parent's failure to appeal from an earlier order does not preclude the parent from raising the issue of ICWA compliance in an appeal from a later order, including an order terminating parental rights [citation]. Accordingly, even though mother did not object at any point to the sufficiency of the inquiry or of the notice given, the issue is cognizable in this appeal." (*In re K.R.* (2018) 20 Cal.App.5th 701, 706 (*K.R.*), italics added.)

CFS also argues that the substantial evidence standard of review applies to mother's claim that the ICWA inquiry and notices in this case were inadequate, and that mother has not satisfied her duty to provide an adequate record that affirmatively demonstrates error. In effect, CFS argues the silence in the appellate record about its efforts to interview family members about possible Indian ancestry should be held against mother. We have recently rejected this same argument, and we do so again here.

In *K.R.*, the social services agency argued it had no duty to document what efforts it made to contact relatives, "and that the absence of information on the subject preclud[ed] mother from meeting her burden on appeal, i.e., to demonstrate error based on the record." (*K.R., supra*, 20 Cal.App.5th at p. 708.) Although we agreed with the agency that generally the appellant has the burden of providing an adequate record that demonstrates reversible error, we noted that "ICWA compliance presents a unique situation, in that . . . although the parent has no burden to object to deficiencies in ICWA compliance in the juvenile court, the parent may nonetheless raise the issue on appeal. [Citation.] The purpose of ICWA and the California statutes is to provide notice to the tribe sufficient to allow it to determine whether the child is an Indian child and whether it wishes to intervene in the proceedings. [Citation.] The parent is in effect acting as a surrogate for the tribe in raising compliance issues on appeal. Appellate review of procedures and rulings that are preserved for review irrespective of any action or inaction on the part of the parent should not be derailed simply because the parent is unable to produce an adequate record." (*Ibid*.)

We also rejected the social services agency's argument that a silent record doomed the mother's challenge because the agency had no affirmative obligation to provide a record of its efforts to comply with ICWA. "[A] social services agency has the obligation to make a meaningful effort to locate and interview extended family members to obtain whatever information they may have as to the child's possible Indian status. [Citation.] The agency cannot omit from its reports any discussion of its efforts to locate and interview family members who might have pertinent information and then claim that the

sufficiency of its efforts cannot be challenged on appeal because the record is silent." (*K.R.*, *supra*, 20 Cal.App.5th at p. 709.) Finally, we noted the juvenile court could not simply assume that, because some information about family members had been included in reports and notices, the agency had complied with its duty to fully investigate. "[T]he court has a responsibility to ascertain that the agency conducted an adequate investigation and cannot simply sign off on the notices as legally adequate without doing so." (*Ibid.*)

Even more recently, we recognized that our decision in *K.R.* "is at odds with established case law which has applied the substantial evidence rule to claims of ICWA error, and which has treated the appellant (usually a parent) as having the burden of demonstrating prejudicial ICWA error on appeal based on an adequate record. [Citation.]" (*In re N.G.* (2018) 27 Cal.App.5th 474, 484.) Nonetheless, we held that "in a case such as this one, where the record does not show what, if any, efforts the agency made to discharge its duty of inquiry (§ 224.3, subd. (a); [citation]), and the record also does not show that all required ICWA notices were given or that the ICWA notices that were given included all known identifying information, the burden of making an adequate record demonstrating the court's and the agency's efforts to comply with ICWA's inquiry and notice requirements must fall squarely and affirmatively on the court and the agency." (*In re N.G.*, at p. 484.) In fact, we held that "in the absence of an appellate record affirmatively showing the court's and the agency's efforts to comply with ICWA's inquiry and notice requirements, we will not, as a general rule, conclude that substantial evidence supports the court's finding that proper and adequate ICWA

notices were given or that ICWA did not apply. Instead, as a general rule, we will find the appellant's claims of ICWA error prejudicial and reversible." (*Ibid.*)

Because the record does not show what efforts, if any, CFS made to investigate the children's possible Indian ancestry, we must conclude substantial evidence does not support the juvenile court's finding that the ICWA inquiry and notice was adequate. Therefore, we conditionally reverse the orders terminating mother's parental rights and remand for further proceedings.

III.

DISPOSITION

The orders terminating mother's parental rights are conditionally reversed. On remand, the juvenile court shall direct CFS to provide the court with a supplemental report detailing what efforts, if any, it has already taken to obtain information about the children's possible Indian ancestry, including the names and other relevant information of family members that were interviewed. The juvenile court shall then determine anew whether the ICWA inquiry and notice was adequate. If the juvenile court determines the inquiry already completed and the notice already given was adequate, the orders terminating parental rights shall immediately be reinstated and further proceedings shall be conducted, as appropriate.

In the alternative, if the juvenile court determines the inquiry already conducted and the notice already given was inadequate, it shall direct CFS to conduct additional inquiry and, if necessary, to provide new notice to the relevant Indian tribes of any additional relevant information CFS might receive. The court shall then determine

whether the additional inquiry and new notice is adequate. If, after receiving the new notices, the relevant tribes do not respond or respond that the children are not Indian children within the meaning of ICWA, the orders terminating parental rights shall immediately be reinstated and further proceedings shall be conducted, as appropriate. If any tribe determines that the children are Indian children, the juvenile court shall proceed accordingly.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

RAPHAEL
J.